

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, DC

ORDER NO. 4955

IN THE MATTER OF:

Served October 24, 1996

Application of TESFAYE A.)
WONDIMU, Trading as U.S. AIRPORT)
EXPRESS SHUTTLE, for a)
Certificate of Authority --)
Irregular Route Operations)

Case No. AP-96-48

By application filed August 12, 1996, Tesfaye A. Wondimu, a sole proprietor trading as U.S. Airport Express Shuttle, seeks a certificate of authority to transport passengers in irregular route operations between points in the Metropolitan District, restricted to transportation in vehicles with a manufacturer's designed seating capacity of 15 or fewer persons, including the driver.

Notice of this application was served on August 26, 1996, in Order No. 4917, and applicant was directed to publish further notice in a newspaper and file an affidavit of publication. Applicant complied.

The application is opposed by Airport Express, Inc., WMATC Carrier No. 253.

SUMMARY OF EVIDENCE

The application includes information regarding, among other things, applicant's facilities, proposed tariff, finances, and regulatory compliance record.

Applicant proposes commencing operations with one van. Applicant's proposed tariff contains an hourly charter rate as well as individual and party airport rates.

Applicant filed a statement of financial condition as of August 1, 1996, showing assets of \$29,044; liabilities of \$14,000; and net worth of \$15,044. Applicant's projected operating statement for the first twelve months of WMATC operations shows WMATC operating income of \$84,000; operating expenses of \$34,102; and net income of \$49,898.

Applicant certifies he has access to, is familiar with, and will comply with the Compact, the Commission's rules and regulations, and United States Department of Transportation regulations relating to transportation of passengers for hire. Applicant further certifies that neither applicant nor any person controlling, controlled by, or under common control with applicant has any control relationship with a carrier other than applicant.

DISCUSSION AND CONCLUSION

This case is governed by the Compact, Title II, Article XI, Section 7(a), which provides in relevant part that:

. . . the Commission shall issue a certificate to any qualified applicant . . . if it finds that --

(i) the applicant is fit, willing, and able to perform [the] transportation properly, conform to the provisions of this Act, and conform to the rules, regulations, and requirements of the Commission; and
(ii) that the transportation is consistent with the public interest.

An applicant bears the burden of establishing fitness and consistency with the public interest.¹ Based on the evidence in this record, the Commission finds applicant has made his prima facie case.

Once an applicant has made a prima facie case, the burden shifts to the protestant to show the contrary, including that its operations would be endangered or impaired contrary to the public interest.² Protestant opposes the application on the grounds that the similarity between applicant's name and protestant's name could confuse the public, that applicant intends to profit from this confusion, and that any deficiencies in applicant's service might be mistakenly attributed to protestant.

We do not believe that denying an application is the appropriate remedy for potential trade name confusion.³ At best, it is grounds for ordering an applicant to change its name as a condition to granting the application.⁴ In this case, we decline to order applicant to change his trade name.

The issue raised by protestant is usually addressed in federal court under the Lanham Act,⁵ which generally prohibits persons from misleading the public about the origin of products and services. We turn to case law in that area for guidance in resolving protestant's claim here.

The existence and extent of trade name protection depends on its inherent distinctiveness.

Courts have identified four general categories of terms: (1) generic, (2) descriptive, (3) suggestive, and (4) arbitrary or fanciful.

. . . .

Descriptive terms, which compose the second category, directly describe a particular quality, function, or characteristic of a product or service.

¹ In re Seth, Inc., t/a Kids Kab, No. AP-93-40, Order No. 4243 at 2-3 (Feb. 9, 1994).

² Id.

³ See id. at 4 (declining to disapprove application on allegation of trade name confusion).

⁴ Id.

⁵ 15 U.S.C. § 1114 et seq.

Because descriptive terms are thus not inherently distinctive, they acquire trademark protection only upon proof of secondary meaning--i.e., upon proof that the public recognizes only one source of the product or service.

Blinded Veterans Ass'n v. Blinded American Veterans Found., 872 F.2d 1035, 1039-40 (D.C. Cir. 1989).

Recently, the United States District Court for the District of Columbia found that the term "U.S. Express" was "descriptive." "The term 'U.S. Express' standing alone does not tell a consumer what the product is. The term could describe any method of rapid transportation, such as for passengers, as well as various types of expedited parcel delivery in the United States." U.S. Express, Inc. v. U.S. Express, Inc., 799 F. Supp. 1241, 1244 (D.D.C. 1992). We find that "Airport Express" is a descriptive term, as well, for the same reasons.

The Commission finds that protestant is not entitled to relief because protestant has not met its burden of proof in demonstrating that the term "Airport Express" has acquired a secondary meaning so as to warrant protection from infringement. A protest must be accompanied by all available evidence on which a protestant would rely.⁶ Protestant's failure to produce any evidence of consumer association of the term "Airport Express" with protestant's services, in the form of current survey evidence, testimonials from customers and the like, fatally undermines protestant's claim.⁷ The testimony of protestant's secretary about consumer loyalties is not persuasive.⁸

Even if protestant had presented some evidence of secondary meaning, it is doubtful that we could find protestant was entitled to exclusive use of the combination of "Airport" and "Express" in one name. "Airport Express" is no more unique than "Airport Shuttle." Currently, nine WMATC carriers operate under a trade name or corporate name containing the term "Airport Shuttle." Protestant is entitled to no more protection than those nine are.

Based on the evidence in this record, the Commission finds applicant to be fit, willing, and able to perform the proposed transportation properly and to conform with applicable regulatory requirements. The Commission further finds that the proposed transportation is consistent with the public interest.

THEREFORE, IT IS ORDERED:

1. That the protest of Airport Express, Inc., is denied.
2. That Tesfaye A. Wondimu, trading as U.S. Airport Express Shuttle, 3701 Ferarra Drive, Silver Spring, MD 20906, is hereby

⁶ Commission Regulation No. 54-04(a).

⁷ See U.S. Express, 799 F. Supp. at 1245-46 (denying relief on same grounds).

⁸ See id. at 1246 (testimony of plaintiff's president not persuasive).

conditionally granted, contingent upon timely compliance with the requirements of this order, authority to transport passengers in irregular route operations between points in the Metropolitan District, restricted to transportation in vehicles with a manufacturer's designed seating capacity of 15 or fewer persons, including the driver.

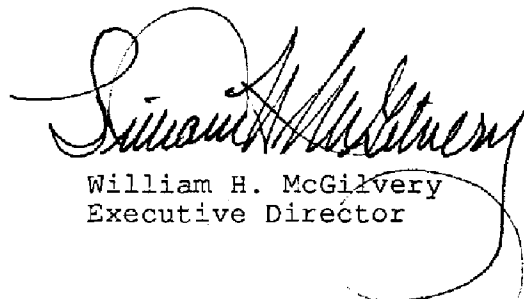
3. That applicant is hereby directed to file the following documents with the Commission: (a) evidence of insurance pursuant to Commission Regulation No. 58 and Order No. 4203; (b) an original and four copies of a tariff or tariffs in accordance with Commission Regulation No. 55; (c) an equipment list stating the year, make, model, serial number, vehicle number, license plate number (with jurisdiction) and seating capacity of each vehicle to be used in revenue operations; (d) evidence of ownership or a lease as required by Commission Regulation No. 62 for each vehicle to be used in revenue operations; (e) proof of current safety inspection of said vehicle(s) by or on behalf of the United States Department of Transportation, the State of Maryland, the District of Columbia, or the Commonwealth of Virginia; and (f) a notarized affidavit of identification of vehicles pursuant to Commission Regulation No. 61, for which purpose WMATC No. 365 is hereby assigned.

4. That upon timely compliance with the requirements of the preceding paragraph and acceptance of the documents required by the Commission, Certificate of Authority No. 365 shall be issued to applicant.

5. That applicant may not transport passengers for hire between points in the Metropolitan District pursuant to this order unless and until a certificate of authority has been issued in accordance with the preceding paragraph.

6. That unless applicant complies with the requirements of this order within 30 days from the date of its issuance, or such additional time as the Commission may direct or allow, the grant of authority herein shall be void and the application shall stand denied in its entirety effective upon the expiration of said compliance time.

BY DIRECTION OF THE COMMISSION; COMMISSIONERS ALEXANDER, LIGON, AND MILLER:



William H. McGilvery
Executive Director